IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1324 OF 2003

Shri.Rajan s/o Kannan Padiyachi,
Indian inhabitant, Aged about 32 years,
R/at N.R.C. colony, G.N.9/193,
Mohane, Tal.Kalyan, Dist.Thane. ...Appellant/
(Accused at Adharwadi Jail, Kalyan) Accused No.1

Versus

The State of Maharashtra
(At the instance of Mahatma Fule Chowk
Police Station, Kalyan) ...Respondent

.....

Mr.Dipam D.Kathrani i/b Mr.Indrajeet Joshi

for Appellant/accused No.1.

Mr.K.V.Saste, A.P.P. for Respondents.

.....

CORAM: A.M.KHANWILKAR, J.

AUGUST 19, 2006.

ORAL JUDGMENT :

1. This Appeal is filed by accused No.1 against the Judgment and Order passed by the Ist Ad-hoc Additional Sessions Judge, Kalyan dated October 8, 2003 in Sessions Case No.159 of 1997. The Appellant/accused No.1 along with two other

accused were charge-sheeted and tried for offence punishable under Sections 363 and 366 read with Section 34 of the Indian Penal Code (herinafter referred to as the 'IPC') as well as for offence punishable under Section 376 of the IPC. The prosecution case briefly stated is as follows :

. The prosecutrix Vaijanta Nandabhau Pawar (hereinafter referred to as 'prosecutrix') was residing in a chawl in Mahatma Phule Nagar at Mohane, Taluka Kalyan, along with her parents - father Nandabhau Kisan Pawar, mother Ratnaprabha Nandabhau Pawar and other family members. The prosecutrix was a student of 10th standard in N.R.C. High School, Mohane, Tal.Kalyan, Dist.Thane. On 24th October 1996, the prosecutrix was to appear for 10th standard examination, which had commenced from 14th October 1996. When she was on her way to School, Appellant/accused No.1 contacted the prosecutrix. The prosecutrix followed the Appellant/accused No.1 and accompanied him to the house belonging to a person named Shivaji Bhoir where co-accused Bhima Gaikwad and Jitu @ Jitendra Sonawane were with them. The

accused No.1 gave false promises of love and marriage to the prosecutrix. It is alleged that the mother (PW 4) and maternal uncle of prosecutrix Rajendra Shripat Kurade (PW 1) came to know about this fact. Accordingly, the Uncle (PW 1) scolded the prosecutrix. It is alleged that on 29th October 1996 at about 12.30 noon, the mother of the prosecutrix accompanied the prosecutrix up to her School to attend the examination. At about 12.40 p.m. mother (PW 4) left the prosecutrix near the gate of N.R.C. High School and returned back home. Thereafter, Appellant/accused No.1, who was waiting for the prosecutrix near the School gate caught hold of the prosecutrix and threatened her saying that he would take care of her parents and maternal uncle. He also told the prosecutrix that her parents and maternal uncle undermine his guts. Thereafter, Appellant/accused No.1 made the prosecutrix sit in one auto-rickshaw and the prosecutrix was taken to Titwala. Co-accused Jitu was also accompanying them. They first visited Titwala Temple where Appellant/Accused No.1 gave one white saree and black blouse to prosecutrix and told her to change her dress. Accordingly,

prosecutrix changed her dress and put on the saree and blouse given to her by the Appellant. Thereafter, they visited Ganpati Temple and took darshan. From there, they went to Village Sangoda. At Village Sangoda, they stayed with one Vijutai Patil, who happened to be the Sarpanch of that village. It is alleged that after reaching Village Sangoda, co-accused Jitu left the spot. However, accused No.2 Bhima Gaikwad and one person Pandu Gaikwad arrived at Sangoda to assist and support Appellant/accused No.1. It is alleged that on the night of 29th October 1996, the Appellant/accused made prosecutrix to stay in the attic room in the house of Vijutai Patil, where he committed rape on the prosecutrix. Thereafter, on 30th October 1996, Appellant and his friend accused No.2 Bhima took prosecutrix to Titwala where they stayed in the house belonging to father-in-law of Ankush Patil, who is the friend of Appellant/accused No.1. It is alleged that even on that night, Appellant accused committed rape on the prosecutrix. Thereafter, on 31st October 1996 at about 10.30 a.m., Appellant/accused No.1 and accused No.2 Bhima and Ankush took the prosecutrix to Khadavli Railway

Station. From there, they went to the house belonging to Bandu Jadhav, which was situated outside the Village. In the evening, some persons arrived and they tried to placate prosecutrix and accused to return to Mohane. It is then stated that on 31st October 1996 at about 8.30 p.m. Appellant/accused No.1 took prosecutrix to Village Falegaon and from where took her to Village Khadavli. Thereafter, Appellant/accused No.1 took prosecutrix to Village Mohane where the Appellant had taken one hut on rent. The Appellant/accused made the prosecutrix to stay in the said hut with him. Thereafter, on the next day, both the Appellant and the prosecutrix proceeded to Ulhasnagar and took one room on rental basis, where they stayed between 1st November 1996 to 8th November 1996, during which period, the Appellant committed rape on the prosecutrix. It is further alleged that on 9th November 1996, Appellant/accused No.1 took the prosecutrix to Karjat. From there, they went to Tambas Gaon and stayed in the house belonging to Ramesh Jadhav for about three days. On 13th November 1996, Appellant and prosecutrix returned to Ulhasnagar and resided

in one hut situated at Gandhi Road, where Appellant/accused committed sexual intercourse with the prosecutrix. It is stated that thereafter on 16th November 1996, Appellant and prosecutrix went to Neral and stayed at Nirala Lodge at Neral. On the next day, they went to Matheran and in the evening, they returned back to Neral. Ultimately, the Appellant and prosecutrix returned back to Mohane on 21st November 1996 at about 10.30 p.m. On reaching Mohane, Appellant threatened the prosecutrix that he had taken photographs of the prosecutrix with him and if she deserted him, he would make those photographs public. When the Appellant/accused was taking the prosecutrix towards Railway Station, in the evening at about 4.00 p.m. at Ambivli Railway Station, some policemen caught hold of them and took them to Mahatma Phule Chowk Police Station.

2. On the basis of the above allegations, offence came to be registered against the Appellant and two other accused punishable under Sections 363, 366 read with Section 34 and Section 376 of the IPC against Appellant/accused No.1. The matter

was investigated. On completion of investigation, charge-sheet was filed. The matter was committed to Court of Sessions Judge, Kalyan at Kalyan. That Court framed charge against the accused, which reads thus :

"C H A R G E

I, R.S.Shrotriya, I Ad hoc Additional Sessions Judge, Kalyan do hereby charge you:-

1. Rajan Kannan Padiyachi,
   Aged about 32 years,
   R/at.N.R.C. colony,
   G.N.9/193, Mohane,
   Tal.Kalyan, Dist.Thane.

2. Bhima Namdeo Gaikwad,
   Aged about 26 years,
   R/at R.S. Jatwan Nagar,
   Mohane, Tal. Kalyan,
   Dist.Thane.

3. Jitu @ Jitendra Gulab Sonawane,
   Aged about 28 years,
   R/at. OPP.Kartik Mandir,
   R.S. Jatwan Nagar,
   Mohane, Tal.Kalyan, Dist.Thane.

as follows:-

You the accused named above, On 29/10/1996 at about 13.00 hrs to 14.00 hrs. from the road, near N.R.C. School, Mohane, Tal.Kalyan, District Thane within the jurisdiction of Mahatma Phule Chowk Police Station, in furtherance of your common intention kidnapped Miss Vaijanta Nandabhau Pawar a Minor, aged about 15 years, from the lawful guardianship of the

complainant Rajendra Shripat Kurhade and thereby committed an offence punishable U/sec. 363 r/w sec. 34 of the Indian Penal Code and within my cognizance.

SECONDLY

You the accused named above, on the aforesaid date, time and place, during the course of same transaction and in furtherance of your common intention kidnapped (or abducted) Miss Vaijanta Nandabhau Pawar a minor, aged about 15 years and took her to Sangoda gaon Falegaon, R.S.Tekdi, Titwala, Ulhasnagar, Karjat, Neral, Matheran, with intend that she may be compelled (or knowing it to be likely that she will be compelled) to marry against her will (or in order that the said Miss Vaijanta Nandabhau Pawar may be forced (or seduced) to illicit intercourse or knowing it to be likely that she will be forced (or seduced) to illicit intercourse and thereby committed an offence punishable U/sec. 366 r/w sec. 34 of the Indian Penal Code and within my cognizance.

THIRDLY

You the accused No.1 named above, on the aforesaid date, time and place, during the course of same transaction, committed rape on Miss Vaijanta Nandabhau Pawar and thereby committed an offence punishable U/sec. 376 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by me on the said charges."

3. The accused pleaded not guilty.

Accordingly, after proceeding with the trial, on

scrutiny of the evidence which had come on record, the Trial Court proceeded to record finding of guilt against the Appellant/accused No.1 only for offence punishable under Sections 363, 366 and Section 376 of the IPC. The Trial Court proceeded to acquit the co-accused Nos.2 and 3. The operative order passed by the Trial Court, which

Judgment and Order is impugned in this Appeal, reads thus :

": O R D E R :

> Accused No.1 Rajan Kannan Padiyachi is convicted under section 235(2) of the Code of Criminal Procedure for the offence punishable under section 363 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years. The accused shall also pay fine of Rs.1000/-. In default of payment of amount of fine accused Rajan shall further undergo rigorous imprisonment for one month.
>
> Accused No.1 Rajan Kannan Padiyachi is also convicted for the offence punishable under section 366 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years and also to pay fine of Rs.1000/-. In default of payment of amount of fine accused shall further undergo rigorous imprisonment for one month.
>
> Accused No.1 Rajan Kannan Padiyachi is

further convicted for the offence punishable under section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years. The accused shall also pay fine of Rs.1000/-. In default of payment of amount of fine accused shall further undergo rigorous imprisonment for one month.

So far as substantive sentences of imprisonment award to accused Rajan Padiyachi for the offence punishable under sections 363, 366 and 376 of the Indian Penal Code are concerned, all the three sentences to run concurrently.

Accused No.1 Rajan Kannan Padiyachi was in prison as under trial prisoner from 21.11.1996 to 17.12.1996. Accused Rajan is given set-of of this period during which he was in prison as under trial prisoner.

Accused No.2 Bhima Namdeo Gaikwad and accused No.3 Jitu @ Jitendra Gulab Sonawane are acquitted for the offences punishable under sections 363 r.w. 34 and 366 r.w. 34 of the Indian Penal Code and set at liberty.

Muddemal property that is the clothes and compass box be destroyed after one year after decision of the case.

Copy of the judgment be supplied to accused No.1 Rajan Kannan Padiyachi forthwith and free of costs.

Pronounced on this 8th day of October, 2003."

4. Having considered the rival submissions and going through the record of the case, insofar

as the finding of fact recorded by the Trial Court that the Appellant/accused had intercourse with the prosecutrix on several occasions between 29th October 1996 till 21st November 1996 is concerned, the same will have to be upheld. No argument was canvassed on behalf of the Appellant to persuade this Court to overturn the said finding of fact. The basis of challenge in this Appeal to the finding of guilt recorded by the Court below is essentially on the argument that the Trial Court has committed manifest error in concluding that the age of the prosecutrix at the relevant time was below 16 years which was the prosecution case. It was thus argued that if this Court were to negate the prosecution case that the age of prosecutrix was below 16 years at the relevant time, in that case, from the evidence on record, it can be safely inferred and held in favour of the Appellant that the prosecutrix was a consenting party right from the stage when she accompanied the Appellant on 29th October 1996 from the School till they returned back to Mohane on 21st November 1996. It is thus contended that neither finding of guilt for offence punishable under Sections 363, 366 or 376

of the IPC can be sustained on accepting that fact situation.

5. Accordingly, I will straight away answer the issue as to whether the Trial Court was right in concluding that the prosecution has established the fact that the age of the prosecutrix at the relevant time was below 16 years of age. For recording this finding, the Trial Court has not only adverted to the ocular evidence of prosecutrix (PW 3), her mother (PW 4), her maternal uncle (PW 1), but also referred to the evidence of Gram Sevak (PW 7) Babasaheb Maruti Waghe, who had issued birth certificate (Exhibit 76) and the evidence of (PW 10) Dr.Sunita Arun Nahgolkar, who had issued medical report (Exhibit 85) after examining the prosecutrix. On analysing this evidence and the arguments of both sides, as noted in Paragraphs 43 and 48 of the impugned Judgment, the Trial Court proceeded to hold in favour of the prosecution and rejected the stand of the Appellant/accused in respect of the factum of age of the prosecutrix at the relevant time. The Trial Court has discussed the relevant evidence as well as the stand taken by

the Appellant with reference to such evidence in Paragraphs 52 to 55 and 58 of the impugned Judgement, which are reproduced thus :

> "52. In the instant case the most material factor is age of the prosecutrix. The prosecution has specifically contended that, at the time of the occurrence, prosecutrix was below 15 years age. So far as age of the prosecutrix is concerned, PW-1 Rajendra Kurade has deposed that, at the time of the occurrence, prosecutrix was 14 years old. His version is not challenged in cross-examination. Prosecutrix Vaijanta has also specifically testified that, she is 15 years old. It is very material to note that prosecutrix's mother PW-4 Ratnaprabha has testified that date of birth of the prosecutrix is 7.9.1982. One more important witness examined by the prosecution is PW-7 Babasaheb Waghe. The witness has specifically testified that, he is serving as Gramsevak in Grampanchayat village Kolewadi, Tal.Junnar, Dist. Pune. He has brought register of date of birth maintained by Grampanchayat in the year 1982. In the register, on 9.9.82 a entry is taken on page No.10 of the register specifically mentioning that prosecutrix Vaijanta born on 7.9.82. In the register name of the mother of the prosecutrix, her grandmother Shantabai and name of the woman who made delivery (Seetabai Gadhve) is specifically mentioned. The extract of the register of the date of birth is at Exh.76. In certificate Exh.85 medical officer has expressed opinion to the effect that prosecutrix is 15 years old. So far as age of the prosecutrix is concerned, advocate of the accused has straneously argued that in the evidence of PW-4

Ratnaprabha Pawar, it has appeared that, at the time of her marriage, Vaijanta was *Sadnyan*. Witness Ratnaprabha has further admitted that prosecutrix got married in the month of February, 1997. The prosecutrix got married in the month of February, 1997. The prosecutrix is having one son and her son is 4 years old. These admissions given by the witness Ratnaprabha indicate that, at the time of the occurrence prosecutrix was major i.e. 18 years old. However, it is material to note that a general question as to the understanding or coming of age was asked to the witness. Therefore the witness has stated that, at the time of her marriage Vaijanta was *Sadnyan*. Admittedly, after the occurrence, immediately marriage of the prosecutrix was performed. The incident has taken place in the year 1996. Witness Ratnaprabha has referred to the puberty of the prosecutrix while saying that, the prosecutrix was *Sadnyan*. Consequently, in view of the vague question was asked to the prosecutrix and chronology, it cannot be said that, in the year 1997, prosecutrix was 18 years old. It is pertinent to note that, Gramsevak of Grampanchayat of village Kolewadi has taken entry as to the date of the birth of the prosecutrix in the register in the year 1982. In the year 1982, Gramsevak named Waikar was working in the Grampanchayat as Gramsevak. Gramsevak Shri Waikar is transferred from the Grampanchayat, Kolewadi, long back. therefore, it is quite clear that, Gramsevak serving in the Grampanchayat in the year 1982 has taken entry as to the date of birth of the prosecutrix in due course of business in the year 1982. Witness Babasaheb Waghe or the witnesses or the police were not having control over the maintenance of the register of the date of birth in the year 1982. Admittedly the entry as to the date of birth is taken by the then Gramsevak. It

is quite clear that the entry is not altered or corrected during last so many years. It is also material to note that, all the details of the parents of the prosecutrix are given in the entry. The entry shows that the prosecutrix born on 7.9.1982. Thus, this is the best and the correct evidence as to the date of birth of the prosecutrix.

53. Advocate of the accused has submitted that, witness Babasaheb Waghe has not prepared the extract Exh.76 in his own hand-writing. However, it is material to note that, in the year 1997, another Gramsevak was serving in Grampanchayat and he has prepared extract of the register. Therefore, this submission of the advocate of the accused cannot be accepted. the Ld.Advocate of the accused has submitted that Medical Officer Dr.Sunita Nangolkar has mentioned in the certificate Exh.85 that, prosecutrix is about 15 to 17 years old. The Ld.Advocate of the accused has further submitted that in view of the settled law and according to medical Jurisprudence, there could be margin of two years either way and the prosecutrix may be above 18 years old. However, the extract of register of date of birth Exh.76 is reliable document and it clearly indicate that prosecutrix born on 7.9.82. It is also settled law that where the birth register shows the age of the prosecutrix to be less than 16 years at the relevant time and the medical opinion put it to between 15 to 16 years, birth register should be preferred. Hence, in view of the reliable evidence in the shape of extract of the register of the birth, in my opinion, the argument advanced by the Ld.Advocate of the accused regarding the age of the prosecutrix cannot be accepted.

54. The Ld.Advocate has further submitted that, if the extract Exh.76 is perused,

there is overwriting on the name of the father of the prosecutrix. Moreover, P.S.I. Shri Chavan himself did not go to village Kolewadi to collect the certificate. However, it is material to note that the register is maintained and the entry is written in the year 1982. For the prosecution, there is no scope to alter or change it. In the year 1982, prosecution did not know that in the further register would be required for the sake of the proof of the age of the prosecutrix. Hence the discrepancies pointed out by the advocate of the accused cannot be accepted.

55. In view of the oral evidence and the witnesses and the register of the date of birth maintained by Kolewadi Grampanchayat, in my opinion, the prosecution has abundantly made it clear that, the prosecutrix born on 7.9.82. Thus, it is quite clear that, at the time of occurrence, the prosecutrix was 14 years and 2 months old.

58. ..... But in the instant case, in the shape of register of date of birth, there is strong evidence to conclusively prove that prosecutrix was only 14 years and 2 months old. Present case is not based only on the evidence of the Ossification test. ....."

(emphasis supplied)

6. The arguments which were raised before the Trial Court as noted in the impugned Judgment referred to above, those very contentions were reiterated before this Court. In my opinion, however, the view taken by the Trial Court on

analysing the evidence on record, as reproduced in the earlier part of this Judgment, is not only a possible view but correct approach adopted by the Trial Court. I have, therefore, no hesitation in upholding the finding of fact recorded by the Trial Court that the age of the prosecutrix at the relevant time was below 16 years. Once this finding of fact is accepted, it necessarily follows that any other argument of the Appellant/accused that the prosecutrix was a consenting party at every stage, including for the intercourse, will be of no avail in view of the mandate of Section 375-Sixthly read with Section 376 of the IPC. As the prosecutrix was under 16 years of age, the fact that she had consented or sexual intercourse was committed with her consent will make no difference. The fact that the prosecutrix was subjected to sexual intercourse, has been established from the evidence of the prosecutrix as well as corroborated by the medical report (Exhibit 85) and the evidence of (PW 10) Dr.Sunita Arun Nahgolkar.

7. As is mentioned earlier, no serious attempt was made to question the finding of fact

that the prosecutrix was subjected to sexual intercourse by the Appellant. It is seen that the Scheme of the cross-examination of the accused/Appellant clearly proceeds on the premiss that he had subjected prosecutrix to sexual intercourse, to which, she was the consenting party. However, consent of the prosecutrix will be of no avail to the Appellant, having failed to vanquish the prosecution case regarding the factum of age of prosecutrix being less than 16 years at the relevant time. It necessarily follows that the finding of guilt recorded by the Trial Court against the Appellant/accused No.1 for offence punishable under Section 376 of the IPC is unquestionable and will have to be upheld.

8. Counsel for the Appellant would then contend that in any case, the finding of guilt recorded against the Appellant/accused for offence under Section 363 and 366 of the IPC cannot be sustained. According to him, from the evidence which has come on record, it is obvious that the prosecutrix did not accompany the Appellant/accused

on account of any enticement or for that matter, a case of taking her away from the lawful guardianship. This argument is canvassed relying on the decision of the Division Bench of our High Court reported in **1999 (1) Mh.L.J. 22 in the case of State of Maharashtra vs. Surendra Kumar Mevalal Mehesh**. This Judgment follows the dictum of the Apex Court in the case of **S.Varadarajan vs. State of Madras reported in 1965 SC 942**. Relying on these decisions, learned Counsel contends that in the fact situation of the present case, conviction recorded in respect of offence under Sections 363 and 366 of the IPC cannot be sustained. Indeed, the Appellant/accused had relied on the decision of our High Court in the case of **State of Maharashtra vs. Surindra Kumar Mevalal Mehesh (supra)** even before the Trial Court. The Trial Court, however, has distinguished that Judgment by holding that the legal position stated in the said decision was in the fact situation of that case. According to the Trial Court, it was held in that case that the prosecutrix had accompanied the accused out of desperation due to constant beating by her father. In my opinion, the Trial Court has misdirected

itself in analysing the Judgment of the Division Bench of this Court in the case of **State of Maharashtra vs. Surendra Kumar Mevalal Mehesh (supra)**. In that Judgment, however, the Court proceeded to answer the issue by first holding that it was not possible to accept the prosecution's case that prosecutrix was below 18 years of age. Indeed, that opinion of the Division Bench may be relevant to the facts of that case. However, that is not the legal position expounded in the said decision. In Paragraph 9 of that decision, the Division Bench went on to hold that even if it is established that a girl below 18 years of age was allegedly kidnapped or taken out from the lawful guardianship, that is not enough, unless it is further established that the minor girl (below 18 years of age) was so taken away or enticed to do so. This legal position has been noted by the Division Bench in the said reported decision relying on the dictum of the Apex Court in the case of **S.Varadarajan vs. State of Madras (supra)**. In Para 9 of this decision, the Supreme Court has made following observations, which read thus :

> "(9) It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian." (emphasis supplied)

9. Counsel for the Appellant would contend that the fact situation in both these decisions, in particular, in case of **State of Maharashtra vs. Surendra Kumar Mevalal Mehesh (supra)** regarding the manner in which the prosecutrix accompanied the accused is parallel in all respects. It is a case where the prosecutrix has eloped along with the Appellant/accused and not one of taking away or of enticement of the prosecutrix as such. So

understood, no conviction for offence punishable under Section 363 or 366 of IPC can be maintained. The argument canvassed on behalf of the Appellant is formidable one. In my opinion, however, it is unnecessary to burden this Judgment by analysing this aspect any further. This is so because, even if the finding of guilt against the Appellant for offence punishable under Section 363 or 366 of the IPC were to be overturned, that will make no difference to the final order passed against the Appellant/accused in respect of offence punishable under Section 376 of the IPC, for which, the Appellant has been ordered to suffer imprisonment for a period of five years and pay fine of Rs.1,000/- (Rupees One Thousand), in default, to suffer further rigorous imprisonment for one month. As I have indicated earlier, the finding of guilt in respect of offence punishable under Section 376 of the IPC will have to be affirmed, in which case, even if acquittal is registered in favour of the Appellant with regard to offence punishable under Section 363 and 366 of IPC, that will not take the matter any further for the Appellant.

10. Counsel for the Appellant would lastly contend that as the Appellant can be found guilty only of offence under Section 376 of the IPC, the sentence imposed by the lower Court may be reduced to one already undergone by the Appellant as the Appellant is in custody since 8th October 2003. Counsel for the Appellant contends that in the present case, it has come on record that the prosecutrix shortly after the incident, got married to some other person and is living happy married life. She has given birth to one son out of the said wedlock. Counsel for the Appellant, therefore, contends that, that fact may be taken as mitigating circumstance and to show leniency to the Appellant. The argument though attractive, cannot be accepted. This is so because the offence for which the Appellant has been found guilty is of committing rape on a girl under 16 years of age, for which offence, the punishment shall ordinarily be not less than seven years. Indeed, the Trial Court has given lesser sentence to the Appellant. As the State has not come up in Appeal challenging lesser sentence, I will refrain from addressing myself to the correctness of the sentence awarded,

except to observe that the Trial Court has not recorded any adequate and special reasons for taking such lenient view in favour of the Appellant. The only reason recorded by the Trial Court is that if the sentence of five years and imposition of fine of Rs.1,000/- (Rupees One Thousand) for every Section for which the Appellant had been convicted is awarded, that would meet the ends of justice. That is the only opinion recorded by the Trial Court, which can neither be said to be adequate or special reason. In such a case, sentence ought to be minimum seven years. Be that as it may, as State has not challenged that part of the order by way of cross appeal, I am not considering that aspect any further.

11. Suffice it to observe that in no case the period of sentence can be brought down than the one already awarded by the Trial Court, having regard to the nature of offence, for which the Appellant has been found guilty. Besides, the grounds now canvassed as the mitigating circumstances at the hearing of the Appeal, for the first time, across the bar, do not commend to me. Accordingly, even

this argument of the Appellant for reducing the period of sentence to already undergone cannot be accepted.

12. Counsel for the Appellant would then contend that benefit of provisions of Section 4 of the Probation of Offenders Act, 1958 be extended to the Appellant. Even this submission will have to be rejected for the simple reason that Section 4 will come to the aid of a person who is found guilty of having committed an offence not punishable with death or imprisonment for life. The punishment for offence of rape under Section 376 of the IPC is imprisonment of either description for a term which shall not be less than seven years, but can be "for life" or for a term which may extend to ten years and shall also be liable to fine. Accordingly, provisions of Section 4 of the Probation of Offenders Act will have no application to offence of the kind, which this Court is required to consider.

13. Counsel for the Appellant then relied on Section 360 of the Code of Criminal Procedure, 1973

(hereinafter referred to as the 'Cr.P.C.'), to contend that this Court in exercise of powers under Section 360 of the Cr.P.C. may release the Appellant on probation of good conduct or after admonition. Reliance placed on this provision by the Counsel for the Appellant is misplaced. Section 360 of Cr.P.C. applies to convict, who is not under 21 years of age, of an offence punishable with fine only or with imprisonment for a term of seven years or less. The Appellant was admittedly over 21 years of age at the relevant time. Accordingly, the Appellant is not entitled for the benefit of Section 360 of Cr.P.C. having regard to the facts of the present case.

14. For the aforesaid reasons, the Appeal will have to be dismissed. Ordered accordingly.

A.M.KHANWILKAR, J.